Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1851

JACQUELINE BARNDT,

Petitioner,

vs.

WISSAHICKON SCHOOL DISTRICT, ET AL.,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

JACQUELINE BARNDT,

Petitioner,

vs.

WISSAHICKON SCHOOL DISTRICT, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

The petitioner, JACQUELINE BARNDT, respectfully prays that a writ of certiorari issue to review the Judgment and Order of the United States Court of Appeals for the Third Circuit entered in this proceeding on February 25, 1980. Respondents are Wissahickon School District; Wissahickon Board of School Directors; William Sabia; Matthew Coleman; Elizabeth Allen; Louise North; Robert Russell; Robert G. Moore; George T. Bauer; Theodore Thompson; Robert J. Correnty; Wesley E. Gorg; Donald Richwagon; Richard S. Thornton; Phyllis Catz, Individually and as Members of the Board of School Directors of Wissahickon School District, and William Stoutenburgh, Individually and as Superintendent of Schools of Wissahickon School District.

OPINION BELOW

The Judgment of the Court of Appeals for the Third reported, appears in Appendix A hereto. The Opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 475 F. Supp. 503 and appears in Appendix B hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered on February 25, 1980. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the due process clause of the Fourteenth Amendment prohibits a school board from making the decision to fire a tenured professional employee where a decision requires the resolution of disputed issues of fact.

2. Whether the decision of this Court in *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482 (1976), is applicable where the public employer must resolve disputed issues of fact.

3. Whether a school board is inherently disqualified by the due process clause of the Fourteenth Amendment from sitting in judgment on the discharge of a tenured professional employee, including the resolution of disputed issues of fact, when the school board is the employer and is also responsible for all school finances including the power to levy taxes, is the body which specifies the charges, where the prosecutor-superintendent of schools is a stat-

utory member of the school board, and where there is no right to *de novo* appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1983 of Title 42, United States Code, *R.S.* §1979 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

24 Pa. Stat. Ann. §5-507 provides:

> In order to establish, enlarge, equip, furnish, operate, and maintain any schools or departments herein

provided, or to pay any school indebtedness which any school district is required to pay, or to pay any indebtedness that may at any time hereafter be created by any school district, or to enable it to carry out any provisions of this act, the board of school directors in each school district is hereby vested with all the necessary authority and power annually to levy and collect, in the manner herein provided, the necessary taxes required, in addition to the annual State appropriation, and shall have, and be vested with, all necessary power and authority to comply with and carry out any or all of the provisions of this act.

24 Pa. Stat. Ann. §10-1082 provides:

The duties of district superintendents shall be the same as those now required of county superintendents, and also such as shall be required of them by the boards of school directors of their respective district. The district superintendent shall have a seat on the board of school directors of the district, and the right to speak on all matters before the board, but not to vote.

24 Pa. Stat. Ann §11-1106 provides:

The board of school directors in every school district shall employ the necessary qualified professional employes, substitutes and temporary professional employes to keep the public schools open in their respective districts in compliance with the provisions of this act.

24 Pa. Stat. Ann. §11-1122 provides, in pertinent part:

The only valid causes for termination of a contract heretofore or hereafter entered into with a profes-

sional employe shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, advocation of or participating in un-American or subversive doctrines, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employe . . .

24 Pa. Stat. Ann. §11-1127 provides:

Before any professional employe having attained a status of permanent tenure is dismissed by the board of school directors, such board of school directors shall furnish such professional employe with a detailed written statement of the charges upon which his or her proposed dismissal is based and shall conduct a hearing. A written notice signed by the president and attested by the secretary of the board of school directors shall be forwarded by registered mail to the professional employe setting forth the time and place when and where such professional employe will be given an opportunity to be heard either in person or by counsel, or both, before the board of school directors and setting forth a detailed statement of the charges. Such hearing shall not be sooner than ten (10) days nor later than fifteen (15) days after such written notice. At such hearing all testimony offered, including that of complainants and their witnesses, as well as that of the accused professional employe and his or her witnesses, shall be recorded by a competent disinterested public stenographer whose services shall be furnished by the school district at its expense. Any such hearing may be postponed, continued or adjourned.

24 Pa. Stat. Ann. §11-1130 provides, in pertinent part:

A written notice of any decision of the board of school directors discharging a professional employe, shall be sent by registered mail to such professional employe at his or her last known address within ten (10) days after such hearing is actually concluded.

24 Pa. Stat. Ann. §11-1131 provides:

In case the professional employe concerned considers himself or herself aggrieved by the action of the board of school directors, an appeal by petition, setting forth the grounds for such appeal, may be taken to the Superintendent of Public Instruction at Harrisburg. Such appeal shall be filed within thirty (30) days after receipt by registered mail of the written notice of the decision of the board. A copy of such appeal shall be served by registered mail on the secretary of the school board.

The Superintendent of Public Instruction shall fix a day and time for hearing, which shall be not sooner than ten (10) days nor more than thirty (30) days after presentation of such petition, and shall give written notice to all parties interested.

The Superintendent of Public Instruction shall review the official transcript of the record of the hearing before the board, and may hear and consider such additional testimony as he may deem advisable to enable him to make a proper order. At said hearing the litigants shall have the right to be heard in person or by counsel or both.

After hearing and argument and reviewing all the testimony filed or taken before him, the Superintend-

ent of Public Instruction shall enter such order, either affirming or reversing the action of the board of school directors, as to him appears just and proper.

STATEMENT OF THE CASE

This action was commenced on October 12, 1978 by Complaint filed in the United States District Court for the Eastern District of Pennsylvania, setting forth a claim under the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1983. Jurisdiction of the District Court was invoked under 28 U.S.C. §1343(3). On August 13, 1979 Chief Judge Joseph S. Lord, III of that Court denied petitioner's motion for summary judgment and granted respondents' motion for summary judgment. A timely appeal was taken from that final Order to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1291.

Petitioner Jacqueline Barndt was a tenured professional employee of respondent Wissahickon School District. (The other defendant-respondents in this case are all the members of the Board of School Directors at the time of petitioner's dismissal as well as the Superintendent of Schools.) After ten years of employment she received two consecutive annual unsatisfactory professional employee ratings. Shortly after receiving the second rating the Superintendent of Schools submitted to the School Board a proposed statement of twenty-five charges against petitioner. These included incompetence, negligence and wilful violation of school laws.

Public hearings concerning these charges were held between September, 1974 and January, 1975, and resulted in 1,585 pages of transcript, which transcript was considered by the District Court in its decision in this matter.

Four days after the last dismissal hearing, on January 27, 1979 the School Board voted publicly, unanimously and without public discussion, to terminate the teacher's employment. Formal notice was given by mail on January 29, 1975. Petitioner's termination was appealed to the Pennsylvania Secretary of Education, who affirmed the Board's decision. A timely appeal to the Commonwealth Court of Pennsylvania was denied. The Supreme Court of Pennsylvania denied petitioner's petition for allowance of appeal filed in that action.

This action, which was filed shortly after petitioner exhausted all her available state remedies, asserted that the procedures of the Pennsylvania School Laws under which petitioner was discharged violate her rights to due process of law under the Fourteenth Amendment to the United States Constitution. These procedures are as follows: A tenured professional employee's employment may be terminated only on grounds of:

> "immorality, incompetency, intemperence, cruelty, persistent negligence, mental derangement, advocation of or participating in un-American or subversive doctrines, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employee." 24 Pa. Stat. Ann §11-1122.

A teacher under these circumstances is entitled to a written specification of the charges given at least ten (10) days before the scheduled hearing. 24 Pa. Stat. Ann. §11-1127. The School Board's decision dismissing the professional employee must be given in writing by registered mail within ten (10) days after the conclusion of the hearing. 24 Pa. Stat. Ann. §11-1130.

From the School Board's decision an appeal lies to the State Secretary of Education, 24 Pa. Stat. Ann. §11-1131, and from there to the Commonwealth Court of Pennsylvania in accordance with the Pennsylvania Administrative Procedure Law, 24 Pa. Stat. Ann. §11-1132. Although the statutes appear to set forth a broad right of review, by judicial construction appeal after the School Board decision is limited to the review of the record made before the School Board and must be sustained if "the evidence including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, *might* have reached that decision . . ." *Landi v. West Chester Area School District*, 23 Pa. Cmwlth. 586, 589, 353 A.2d 895 (1976) [emphasis by the court].

The Board of School Directors, which by statute is the only body that conducts an evidentiary hearing and which makes the decision to be reviewed on the basis of the foregoing standard, has the overall power to manage the schools. The Board of School Directors is the tenured teacher's employer. 24 Pa. Stat. Ann. §11-1106. That same School Board has the power to establish its own budget and to levy, assess and collect taxes. 24 Pa. Stat. Ann. §§5-507, 6-602. The Superintendent of Schools, who in these proceedings both recommends discharge and presents the case against the teacher, is *ex officio* a member of the School Board with the right to speak on all matters before the Board, but without the right to vote. 24 Pa. Stat. Ann. §10-1081.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with the decision of another court of appeals as to the necessity of an independent fact finder where factual issues are in dispute.

The courts below held that this case was controlled by *Hortonville Joint School District No. 1 v. Hortonville Education Association,* 426 U.S. 482 (1976). *Hortonville* involved whether school board members with the power to employ and dismiss a teacher could, consistent with due process, dismiss teachers engaged in a strike prohibited by state law. This Court specifically pointed out that there was no question that the teachers were engaged in a strike and no question that that strike was illegal under state law. The School Board's only decision was therefore how its discretion should be exercised to carry out its duties. The courts below in this case held the decision in *Hortonville* to be fully applicable even though the charges against petitioner were factually disputed.

That decision is contrary to the decision of the United States Court of Appeals for the Tenth Circuit in *Staton v. Mayes,* 552 F.2d 908 (10th Cir.) *cert. denied* 434 U.S. 907 (1977). That case was an action under 42 U.S.C. Section 1983 by a superintendent of schools who was dismissed by vote of the local school board on charges of wilful neglect of duty and incompetence. The Tenth Circuit declined to hold *Hortonville* applicable to a case in which fact finding was critical.

The decision of the courts below in this case, holding *Hortonville* fully applicable even though facts were in dispute, is in direct conflict with the decision in *Stanton v. Mayes, supra.*

This conflict justifies the grant of certiorari to review the judgment below.

II. The decision below is in conflict with this court's decision in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

The bias which is asserted in this case is a bias which is inherent in the office of school director. Under Pennsylvania Law the school board is the employer. It is also the only board with the power to employ and dismiss employees. The school board has a direct pecuniary interest in employment because it is responsible for school finances and has the power to assess taxes.

In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) this Court struck down an Ohio statutory scheme which permitted mayors to sit as judges in cases of ordinance violations and traffic offenses. The mayor of an Ohio town had wide executive power, was the chief conservator of the peace, and was responsible to account for village finances. Part of the village income was derived from these fines. This Court held that, although trial *de novo* was available, this did not overcome the failure to provide a neutral and detached judge in the first instance.

In this case the Board of School Directors has a similar pecuniary interest in the outcome of these cases—it spends less money if it discharges a teacher. The Board is responsible for finances, and has the power to assess and collect taxes. Yet, under Pennsylvania Law, this same school board resolves conflicting factual issues when the continued employment of a tenured professional employee is drawn into question, without *de novo* review.

The decision below, upholding that statutory scheme is contrary to a decision of this Court, which justifies the grant of certiorari.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Order of the Third Circuit.

Respectfully submitted,

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Dated: May 19, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET NO. 79-2279

BARNDT, JACQUELINE,

Appellant,

vs.

WISSAHICKON SCHOOL DISTRICT and WISSAHICKON BOARD OF SCHOOL DIRECTORS and SABIA, WILLIAM; COLEMAN, MATTHEW; ALLEN, ELIZABETH; NORTH, LOUISE; RUSSELL, ROBERT; MOORE, ROBERT G.; BAUER, GEORGE T.; THOMPSON, THEODORE; CORRENTY, ROBERT J.; GORG, WESLEY E.; RICHWAGON, DONALD; THORNTON, RICHARD S.; CATZ, PHYLLIS, all of the above named individually and as members of the Board of School Directors of Wissahickon School District, and STOUTENBURGH, WILLIAM, individually and as Superintendent of Schools of Wissahickon School District

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. CIVIL NO. 78-3396

SUBMITTED UNDER RULE 12(6) FEBRUARY 21, 1980
BEFORE: ROSENN AND SLOVITER, CIRCUIT JUDGES, AND
LAYTON, DISTRICT JUDGE*

---

* Honorable Caleb R. Layton, 3rd, United States District Judge for the District of Delaware, sitting by designation.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/s/ Max Rosenn
MAX ROSENN,
Circuit Judge

Attest:

/s/ Thomas F. Quinn
THOMAS F. QUINN,
Clerk

DATED: FEB. 25, 1980

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 78-3396

JACQUELINE BARNDT

vs.

WISSAHICKON SCHOOL DISTRICT

-and-

WISSAHICKON BOARD OF DIRECTORS

-and-

WILLIAM SABIA, MATTHEW COLEMAN, ELIZABETH ALLEN, LOUISE NORTH, ROBERT RUSSELL, ROBERT G. MOORE, GEORGE T. BAUER, THEODORE THOMPSON, ROBERT J. CORRENTY, WESLEY E. GORG, DONALD RICHWAGON, RICHARD S. THORTON, and PHYLLIS CATZ, all of the above-named individually and as members of the Board of School Directors of Wissahickon School District

-and-

WILLIAM H. STOUTENBURGH, Individually and as Superintendent of Schools of Wissahickon School District

OPINION

JOSEPH S. LORD, III, CH. J. August 13, 1979

Plaintiff in this civil rights suit alleges that she was unconstitutionally dismissed from a tenured teaching position in the Wissahickon School District. Contending that

Article XI of the Pennsylvania Public School Code pursuant to which she was dismissed, 24 P.S. §11-1101 *et seq.*, violates both the due process and equal protection clauses both facially and as applied, plaintiff seeks injunctive and monetary relief. I have jurisdiction under 28 U.S.C. §1343(3) and 42 U.S.C. §1983. The parties have cross-moved for summary judgment. For the reasons discussed below, I will deny plaintiff's and grant defendants' motion.

I.

Plaintiff Barndt was hired by the Wissahickon School District in June 1964 as a junior high school music teacher. In July 1973, William Stoutenburgh, Superintendent of Schools for the Wissahickon District, notified plaintiff that her professional employee rating for the 1972-1973 school year was unsatisfactory. In April 1974, the Superintendent notified Barndt that her 1973-74 performance was again unsatisfactory. Each notice to plaintiff of her unsatisfactory rating was accompanied by supporting documents.

Shortly after Barndt's second consecutive unsatisfactory rating, Superintendent Stoutenburgh submitted to the Board of Directors of the Wissahickon School District (School Board) a proposed statement of charges against plaintiff. Stoutenburgh's proposal, stating twenty-five counts of alleged incompetence, negligence and wilfull violation of school laws, was accepted by School Board resolution on June 27, 1974. Between September 1974 and January 1975 the Board held fourteen public hearings on the charges. Barndt was present and represented by counsel throughout the proceedings. On January 27, 1975, four days after the last dismissal hearing, the School Board voted publicly, unanimously and without discussion to terminate plaintiff's employment for the reasons stated in the twenty-five counts.

Barndt was notified formally on January 29, 1975 by mail that the Board had found the charges against her supported by the evidence presented at the fourteen hearings and that her dismissal was therefore being ordered. Plaintiff appealed her termination to the Pennsylvania Secretary of Education, who on January 27, 1976 affirmed the Board's decision. The Secretary's opinion was appealed to the Pennsylvania Commonwealth Court, which on February 7, 1977 again affirmed the dismissal decision. *Barndt v. Board of School Directors*, 28 Pa. Cmwlth. 482, 368 A.2d 1355 (Cmwlth. Ct. 1977). The Supreme Court of Pennsylvania denied allocatur per curiam in December 1977 and plaintiff commenced this action in early 1978.

II.

Plaintiff has moved for summary judgment, arguing that the Pennsylvania statute under which her employment was terminated is constitutionally deficient in four facial respects: (A) due process requires that the body responsible for dismissal decisions be impartial and the statutorily designated body in Pennsylvania, the district school board, because of its pecuniary interest in teacher employment, is not unbiased; (B) judicial appeal *de novo* from a school board dismissal decision is not permitted by the statute; (C) the statute does not specify rules of evidence for a dismissal hearing and this failure unfairly leaves a teacher unable to prepare a defense; and (D) the statute is repugnant to equal protection principles because tenured and non-tenured teachers are irrationally treated differently for dismissal purposes, to the detriment of tenured teachers. Plaintiff's allegations of facial invalidity are unpersuasive and I will deny her motion.

(A) "A biased decision-maker [is] constitutionally unacceptable [and] 'our system of law has always endeavored

to prevent even the probability of unfairness.'" *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), *quoting In re Murchison*, 349 U.S. 133, 136 (1955). Plaintiff complains that this axiom of due process is violated by the Pennsylvania statute. Section 11-1129 of the Public School Code grants authority to dismiss tenured teachers to the local school board, a body that has, as employer, a pecuniary interest in a teacher's discharge allegedly preclusive of impartiality. The statute for this reason is, Brandt insists, on its face "constitutionally unacceptable."

The complete answer to plaintiff's unfairness argument is citation to *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482 (1976). In *Hortonville*, the Court was asked to invalidate as inconsistent with due process the dismissal of striking teachers by a school board that had been negotiating unsuccessfully with the strikers. Observing that plaintiff teachers "seem to argue that the Board members had some personal or official stake in the decision whether the teacher should be dismissed," Chief Justice Burger concluded that to fear that "the Board members had the kind of personal or financial stake in the decision that might create a conflict of interest" was not justified. 426 U.S. at 491-92. "[I]n light of the important interest in leaving with the Board the power given by the state legislature," the Court held that a school board's pecuniary interest as employer in the expense of paying a tenured teacher "is not enough to overcome the presumption of honesty and integrity in policymakers with decision making power. Accordingly . . . the Due Process Clause of the Fourteenth Amendment did not guarantee [the teachers] that the decision to terminate their employment would be made or reviewed by a body other than the School Board." 426 U.S. at 497.

Barndt correctly urges that the *Hortonville* case is distinct from her suit because *Hortonville* involved only a policy decision, and not preliminary factfinding by the school board, the teachers there having admitted that they were on strike. 426 U.S. at 494. However, this factual difference is analytically irrelevant to the impartiality concern. Plaintiff offers no reason why the Wissahickon School Board's pecuniary interest in her employment would impermissibly bias its factfinding but not its policymaking and we can imagine none. The attempted distinction between the alleged unfairness here and that treated in *Hortonville* fails, the Supreme Court opinion there is dispositive and plaintiff's first due process argument is rejected.

(*B*) Section 11-1131 of the challenged statute allows a teacher aggrieved by a school board decision to petition the Pennsylvania Secretary of Education for review of the board action. Section 1132 provides that the decision of the Secretary of Education may be appealed to the Pennsylvania Commonwealth Court under the judicial review terms of the Pennsylvania Administrative Law Code, 71 P.S. §1710.41 *et seq.* Section 1710.44 states that the Commonwealth Court "shall hear the appeal without a jury on the record. . . ." *De novo* appeal to a judicial body is thus not available to a tenured teacher. Barndt complains that this absence of *de novo* judicial appeal "deprives plaintiff of any effective means to a hearing before an impartial tribunal." The dispositive response to this complaint is, oddly, found in plaintiff's memorandum in support of her motion for summary judgment. Barndt there acknowledges "that there is no Constitutional right to an appeal *de novo*." Because the absence of *de novo* judicial review implicates no constitutional right, plaintiff's contention that the statute is in this regard facially infirm fails.

(*C*) Barndt's third due process allegation of facial invalidity is that the failure of the Pennsylvania statute to prescribe a code of evidence for the conduct of dismissal hearings deprives teachers of the ability to prepare intelligently their defenses in light of established evidentiary rules. I hold that plaintiff lacks standing to raise this claim.

Immersion in the conceptual quagmire of standing is not necessary to conclude that to challenge a statute in federal court a plaintiff must credibly allege a logical nexus between the injury suffered and the purported statutory defect. *Flast v. Cohen*, 392 U.S. 83, 102 (1968). Review of the 1,585 page verbatim transcript of plaintiff's dismissal hearings before the Wissahickon Board compels the judgment that the Barndt proceedings were conducted pursuant to common law rules of evidence and that plaintiff's counsel handled her case accordingly. Because the statutory failure to specify evidentiary rules thus did not prejudice plaintiff in her defense, she fails to satisfy the standing requirement of a nexus between her dismissal and the alleged constitutional imperfection in the Public School Code. I therefore am powerless to hear this part of her complaint.

(*D*) Plaintiff's final Fourteenth Amendment challenge to the facial validity of the statute is her equal protection argument that tenured teachers are impermissibly treated differently for dismissal purposes than both non-tenured teachers and other licensed professionals such as lawyers, doctors and dentists. This contention too is flawed.

The Public School Code creates various classes of teachers, only one of which is tenured. Unlike dismissal of tenured teachers, which is covered by the School Code, dismissal of non-tenured teachers is governed by the local agency law, 53 P.S. §11301. Local agency law procedures

are not identical to those mandated by the School Code. Plaintiff argues that the application of different procedures to dismissals of tenured and non-tenured teachers denies tenured teachers like herself equal protection of the laws.

The standard against which the challenged differences in treatment must be measured is succinctly stated in *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976):

> "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations [citations omitted]. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest."

The distinction between tenured and non-tenured teachers touches neither a fundamental right nor a suspect classification. Accordingly, the procedural line between tenured and non-tenured teachers will not be erased unless irrational.

Plaintiff, acknowledging the legitimacy of the state's interest in designing a dismissal scheme, cites two differences allegedly exemplary of the irrational discrimination worked against tenured teachers by the separate procedural regimes: (a) the availability to non-tenured but not tenured teachers of an appeal *de novo* to the court of common pleas, and (b) the local agency law requirement that the administrative tribunal—the school board here—make a written decision. Neither difference is irrational.

The local agency law permits, but does not require, the court of common pleas to hear *de novo* an appeal from an agency decision where a full record of the proceedings below was not made. 53 P.S. §11308a. Where a complete transcript of the agency proceedings was made, the court must hear the appeal without a jury on the certified record. 53 P.S. §11308b. All judicial appeals by tenured teachers are to be heard on the record. 24 P.S. §11-1132; 71 P.S. §1710.44. However, all dismissal proceedings involving tenured teachers must be recorded at the school board's expense. 24 P.S. 11-1127. Therefore, tenured and non-tenured teachers who are similarly situated—*i.e.*, whose dismissal hearings have been recorded—are not treated differently; both are denied a *de novo* judicial appeal. The different procedures are applied to different situations —*de novo* appeal where there is no record, no *de novo* appeal where there is. Such a distinction is certainly rational.

Barndt's second illustration of alleged irrationality is also unconvincing. Section 11306 of Title 53 requires all agency adjudications to be in writing. The Public School Code does not include this requirement. What the School Code requires instead is that the board furnish the tenured teacher with a detailed written statement of the charges against her before the hearing, 24 P.S. §11-1127, and that written notice of the board's decision be sent promptly to the teacher after the hearing, 24 P.S. §11-1130.

Because the notice of dismissal sent to Barndt incorporated the earlier twenty-five count statement of charges, plaintiff received the functional equivalent of a written adjudication. *See* III (B) *infra*. I therefore doubt that she has standing to complain that such a writing is not expressly required, she having suffered no prejudice from that absence. Assuming *arguendo* only that the claim is properly raised, I conclude that because a written state-

ment of charges is required in tenured teacher dismissals, but not in non-tenured cases, to permit simply a written notice of the board's decision in a tenured teacher proceeding, rather than require the written adjudication mandated in non-tenured dismissals, is not irrational. Such a distinction is perhaps not irresistably logical, but it is not so barren of sense as to justify judicial invalidation.

Finally, I reject plaintiff's contention that tenured teachers are invidiously and irrationally subjected to different dismissal procedures than are lawyers, doctors and dentists. Although the procedures are fundamentally different, in that lawyers, doctors and dentists are statutorily entitled to a delicensing hearing before a state board composed in part of their professional peers, this difference cannot be said to lack all foundation in reason. Teachers in numerous and obvious ways are dissimilarly situated to the other professionals listed—for example, teachers like Barndt are public employees; lawyers, doctors and dentists ordinarily are not—and accordingly may be supervised under a separate set of procedures.

Because each of plaintiff's facial challenges to the Public School Code fails, I will deny her motion for summary judgment.

III.

Defendants have moved for summary judgment, contending that none of the six issues of fact advanced by plaintiff as preclusive of summary disposition is genuine. I agree. Defendants are entitled to judgment as a matter of law.

Procedurally, plaintiff objects that defendants' motion is not accompanied by affidavits as required by F.R.Civ. P. 56. This objection is wrong for two reasons: (a) de-

fendants' motion is accompanied by affidavits where relevant; and (b) Rule 56 requires only that a party opposing a motion for summary judgment counter any affidavits presented by the moving party with his own affidavits, not that a party moving for summary judgment in all cases support his motion with affidavits. Exhibits, such as the voluminous ones submitted by defendants here, are sufficient to support a motion for summary judgment.

Turning to the merits of defendants' motion, the issues of fact that plaintiff contends are genuine and material, and the reasons why they are not are as follows:

(A) Barndt alleges that the admission of hearsay testimony at her dismissal hearings unconstitutionally deprived her of the due process right of confrontation of witnesses. Plaintiff has failed to specify the objectionable statements and the prejudice that they caused, although she did complain at oral argument that evaluations of her performance filed by pupils and parents were summarized by Superintendent Stoutenburgh in his testimony.

I have scanned the 1,585 page transcript of the School Board hearings and conclude that plaintiff's complaint that she was exposed to an unconstitutional level of hearsay is unfounded. The record reveals that Barndt's counsel raised hearsay objections, for example p. 718a of defendants' exhibit 1, and that questions calling for a hearsay response were withdrawn, for example p. 742a of exhibit 1. Further, the only evidence that plaintiff cites as objectionable—the complaints lodged against Barndt by pupils and parents—was not hearsay because admitted not for the truth of those statements but rather as proof of public opinion, a material consideration in a dismissal proceeding. I thus need not reach the question of the constitutionally tolerable level of hearsay, *California v. Green*, 399 U.S. 149 (1970), to decide that plaintiff's allegation raises no genuine issue of material fact.

(B) Plaintiff alleges that the School Board's failure to present her with a written adjudication of her dismissal was a violation of due process. The January 29 letter sent to Barndt by the Secretary of the School Board informing her of the unanimous vote that she be discharged stated that the Board found the twenty-five count statement of charges supported by the evidence heard at the fourteen dismissal hearings. This incorporating reference in plaintiff's dismissal letter to the written charges against her is, I think, tantamount to a written adjudication of Barndt's case and satisfies the requirements of due process.

(C) Plaintiff vaguely alleges that the procedure by which the School Board accepted the twenty-five statement of charges against her and set the matter for dismissal hearings was improper. The record discloses not a hint of constitutionally suspicious proceedings by the Board and I must conclude that no genuine issue of fact is raised by this allegation.

(D) Plaintiff alleges that she was denied upon request various materials necessary to her defense. Although defendants concede that Barndt was denied access to certain sensitive documents, such as confidential pupil performance reports, plaintiff does not deny that the information contained in these papers was made available to her at the final hearings. I can discern in the record not the merest suggestion of prejudice to Barndt's defense caused by this form of disclosure and I find no genuine issue of material fact.

(E) Plaintiff objects to the role of the School Board's counsel in her dismissal, alleging that he unconstitutionally served both as counsel to the Board during its adjudication of her case and as counsel to the Board during her appeal of the Board's decision to the Secretary of Education and the Commonwealth Court. This bizarre contention raises

neither a genuine nor a material issue of fact, the conduct of counsel for the Board being both admitted and perfectly proper.

(F) Finally, plaintiff alleges that Superintendent Stoutenburgh unconstitutionally performed the roles of prosecutor, witness and judge at her dismissal hearings. This allegation is anchored in the statutory provision granting the superintendent a seat, but not a vote, on the district school board, 24 P.S. §10-1081. Barndt argues that because Stoutenburgh prepared the charges against her and testified against her at the hearings, his statutory seat on the Board intolerably commingled the duties of prosecutor and judge.

I need not consider whether a due process problem arises where a district superintendent actually takes a seat on the local board. Defendants have accompanied their motion for summary judgment with an affidavit given by Robert Russell, presently Secretary of the Board of School Directors of the Wissahickon School District and at all relevant times a member of the Board, swearing that Superintendent Stoutenburgh never assumed his statutory seat on the School Board. Plaintiff has failed to rebut with counter-affidavit defendants' sworn statement, and therefore has failed to put this potentially material fact in genuine issue as required by Rule 56.

Further, there is nothing in the record from which an inference of unconstitutional commingling of duties could be drawn. The School Board hearings on plaintiff's dismissal ended on January 23, 1975. No meeting was held between that time and January 27, 1975. On January 27, the School Board, in a public meeting, voted unanimously without discussion to discharge Barndt. The total absence of discussion by the Board between the end of the evidentiary hearings and the dismissal vote conclusively rebuts

any contention of unfair influence by the Superintendent. No genuine issue of fact is raised by this allegation.

Barndt's complaint raises no issues of fact preclusive of summary disposition and defendants are entitled to judgment as a matter of law. Accordingly, I will grant the motion for summary judgment filed by defendant Wissahickon School District and joined in by all defendants. The various other motions filed by individual defendants will be denied as moot in light of my granting of the umbrella motion.

/s/ Joseph S. Lord, III
JOSEPH S. LORD, III
CH. J.

Supreme Court, U. S.
FILED
JUN 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-1851.

JACQUELINE BARNDT,

Petitioner,

v.

WISSAHICKON SCHOOL DISTRICT, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENTS' BRIEF IN OPPOSITION.

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IN THE

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OCTOBER TERM, 1979.

No. 79-1851.

JACQUELINE BARNDT,

Petitioner,

v.

WISSAHICKON SCHOOL DISTRICT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION.

This brief is filed on behalf of respondents named on page 1 of Petitioner's brief (except Elizabeth Allen and George T. Bauer). These respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Third Circuit's judgment in this case. That order appears in appendix A to Petitioner's petition. It affirms the judgment of the U. S. District Court for the Eastern District of Pennsylvania, Lord, Ch. J., the opinion and order of which are printed as Exhibit B to Jacqueline Barndt's petition and are reported at 475 F. Supp. 503.

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

Respondents object to the following words at the end of Petitioner's Questions Presented number 3. Respondents say that these questions are not proper for consideration here, having been held to be foreclosed and excluded from consideration by admissions in the Court below:

> . . . where the prosecutor-superintendent of schools is a statutory member of the school board, and where there is no right to de novo appeal.

COUNTERSTATEMENT OF THE CASE.

Petitioner correctly says on page 7 of her brief that she was a tenured professional employee of respondent Wissahickon School District. But her next statement is incorrect in saying:

> . . . (The other defendant-respondents in this case are all the members of the Board of School Directors at the time of petitioner's dismissal as well as the Superintendant of Schools.)

Since this inaccuracy of characterization probably does not affect major issues, correction has been relegated to a final page of this brief entitled Supplement.

For their own Counter-Statement of the Case, Respondents incorporate the first three pages of the Opinion of the United States District Court, reproduced at pages 3a to 5a inclusive of Petitioner's Appendix B.

Toward the end of Petitioner's Statement there are two other matters which Respondents say are objectionable because they are argumentative and also because they go beyond the record: i.e.

(a) By citing a certain Pennsylvania Commonwealth Court case, Petitioner seeks to go beyond the appeal procedure provided by the Pennsylvania School Code and to show that it has been narrowed by judicial interpretation. Although it is deemed inappropriate, the contention is nevertheless answered hereafter in the part of Respondent's discussion entitled *Landi.*[1]

(b) Finally, Respondents disclaim statements appearing at the very end of petitioner Barndt's Statement of the Case wherein she refers to the scope of review of school board hearings and also to the function of the School Superintendent. Although these argumentative statements are deemed inappropriate they will nevertheless be answered hereinafter under Discussion.

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1. *Landi v. West Chester Area School District,* 23 Pa. Commonwealth Ct. 586, 589, 353 A. 2d 895 (1976).

CONDENSED SUMMARY OF REASONS FOR DENYING THE WRIT.

I. The Decision Below in No Way Conflicts With *Staton v. Mayes.*[2]

The *Staton* case had nothing in common with *Hortonville*[3] or the present case because *Staton* concerned a palpable violation of procedural due process. The *Staton* record showed flagrant personal bias on the part of school board members who had avowedly sought dismissal of the employee. In the *Hortonville* case, bias had been considered as a possibility but found not to exist. In the instant case there was not even the slightest hint of actual bias.

II. The Decision Below Does Not Conflict in the Slightest With *Ward v. Monroeville.*[4]

The decision below was completely unlike *Ward* or, for that matter, *Ward's* progenitor *Tumey.*[5] Those were cases where the 'tribunals' revenues depended on their levies of fines and costs. There is no such element in the instant case; no profit motive was remotely imputable to the school board.

III. All Contentions of Petitioner Are Fully Negated in the Opinions of the Court Below—Appendices A and B.

DISCUSSION.

The following discussion will be confined strictly to points already raised, and is designed simply to add a little

2. *Staton v. Mayes,* 522 F. 2d 908 (10th Cir.) cert. denied 434 U. S. 907 (1977).

3. *Hortonville Joint School District No. 1 v. Hortonville Education Association,* 426 U. S. 482 (1976).

4. *Ward v. Village of Monroeville,* 409 U. S. 57 (1972).

5. *Tumey v. Ohio,* 273 U. S. 510 (1927).

meat to the bare bones of the preceding skeletonized statements. Reasons for denying the writ will first be discussed. Then the items challenged in Petitioner's Questions Presented, and finally the points which we challenged in Barndt's Statement of the Case will be argued.

I. Inapplicability of *Staton v. Mayes.*

Like many of the cases in which personal constitutional rights are involved, *Staton v. Mayes* at 552 F. 2d 913 sets forth the basic rule expounded in *In re: Murchison,* 349 U. S. 133, 136 (1955):

> a fair trial and a fair tribunal is the basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.

In *Staton v. Mayes* at 552 F. 2d 913, the Court of Appeals for the 10th Circuit then proceeded to analyze the evidence which clearly showed that at least three members of the five man school board had made repeated statements such as "Dr. Staton has got to go". For instance, defendant Mayes advertised in a Muskogee, Oklahoma paper that he was running on a campaign to get rid of Dr. Staton. (Ibid. 916).

This was a clear case of actual bias and any references to the *Hortonville* case simply manifested that the presumption of school board fairness could not survive proof of actual bias. (Ibid. 913). The principles of *Hortonville* were honored, including that of the obvious interest of the State in the particular procedure provided for the removal of school personnel. Id. 913.

The Opinion of the *Staton* court was at pains to point out that no presumption of regularity could withstand proof of actual bias. In the process it was suggested that the *Hortonville* case, in which there had been a hint of

bias, was a different matter in that the facts of the school personnel's dereliction (by illegal strike) were admitted. But that does not mean that there was any possible conflict between *Staton* and the instant case wherein there had been no inkling of actual bias.

II. Inapplicability of *Ward v. Village of Monroeville.*

Ward v. Village of Monroeville, 409 U. S. 57 (1972) is even farther from the mark. In the *Hortonville* decision itself (at 426 U. S. 491), the following distinction is made.

> Respondents' argument rests in part on doctrines that have no application to this case. They seem to argue that the Board members had some personal or official stake in the decision whether the teachers should be dismissed, comparable to the stake the Court saw in *Tumey v. Ohio,* 273 U. S. 510 . . . or *Ward v. Village of Monroeville,* 409 U. S. 57 (1972).

The vice of trial before the Ohio tribunal in *Tumey v. Ohio* is exposed in this one sentence by the late Chief Justice William Howard Taft:

> There is, therefore, no way by which the Mayor may be paid for his services as judge, if he does not convict those who are brought before him. . . .
> 273 U.S. 510, 520 (1926).

The *Ward* case was one in which there was some sort of insulation between the revenue-producing court and the functionary who served as judge, but *Tumey* was held controlling. There is no way, however, that the Pennsylvania school board system can be likened to that of those minor criminal courts which operated on a fee system. In the court below, there appears the following language (App. 7a) which, we submit, is conclusive:

> . . . Plaintiff offers no reason why the Wissahickon School Board's pecuniary interest in her employment would impermissibly bias its factfinding but not its policymaking and we can imagine none. The attempted distinction between the alleged unfairness here and that treated in *Hortonville* fails, the Supreme Court opinion there is dispositive and plaintiff's first due process argument is rejected.

Even in *Hortonville*, it was a known fact that the teachers were on strike, which is to say that the teachers' pay was at issue. But in the instant case, there was no word of testimony whatsoever as to Mrs. Barndt's salary and no hint as to what the effect of her dismissal would have, plus or minus, on the school exchequer.

* * *

The following discussion relates to objections stated heretofore concerning Barndt's Questions Presented, and also as to her Statement of the Case. In our Counterstatement, we asserted that certain points were not properly includable. Thus the following comments are added only in the event that Respondents were in error in assuming that those points of Petitioner are not entitled to consideration.

1. In part 3 of her questions stated, the rhetorical question as to facial invalidity of the Pennsylvania School Code dismissal procedure includes the following words:

> . . . where the prosecutor-superintendent of schools is a statutory member of the school board. . . .

At 14a of the Opinion below, the court ruled that this matter of Superintendent Stoutenburgh's status was not properly in the case by virtue of plaintiff's failure to

answer the School Board's affidavit. We suggest it is improper to try to revive the point again.

2. At the same place, the question contains this additional language which we deemed objectionable:

> . . . and where there is no right to de novo appeal.

That claim is rejected in the Opinion below at 7a, in large part upon Barndt's own concession that "there is no constitutional right to an appeal de novo."

There is also discussion of the de novo appeal matter in another aspect at Appendix 10a. Notable also is the third paragraph of the School Code provision for appeal to the Secretary of Education, 24 Pa. Stat. Ann. § 11-1131, as quoted at page 6 of Petitioner's brief:

> The Superintendent of Public Instruction [now Secretary of Education] shall review the official transcript of the record of the hearing before the board, and may hear and consider such additional testimony as he may deem advisable to enable him to make a proper order. . . .

3. The *Landi* case. In our Counterstatement of the Case, Respondents have challenged Barndt's citation of *Landi v. West Chester Area School District*, 23 Pa. Commonwealth Ct. 586, 589, 353 A. 2d 895 (1976). Our first objection to the reference was that it goes beyond the record, and attempts to inject a point not presented to the court below. Moreover, we suggest here that it is not presented with complete candor. The Substantial Evidence Rule which it quotes is of such universal acceptance that need for citation is deemed unnecessary. But what was presented to the Commonwealth Court in that case was the record before the School Board plus the findings of fact of the Secretary of Education. The following sentence will suffice to illustrate:

> Our careful review of the record convinces us that a reasonable man acting reasonably could have reached the decision made by the Board and the Secretary. . . . 353 A. 2d at 897.

As recently as February 26, 1980, the function of the Commonwealth Court in a case like *Landi* was restated in *Nagy v. Belle Vernon Area School District,* — Pa. Commonwealth Ct. —, 412 A. 2d 172, 174 (1980):

> Our scope of review in appeals from the Secretary of Education is to determine whether or not an error of law was committed, constitutional rights were violated, or necessary findings of fact are unsupported by substantial evidence. *McCoy v. Lincoln Intermediate Unit No. 12,* 38 Pa. Cmwlth. 29, 391 A. 2d 1119 (1978).

We trust the foregoing references to the *Landi* case and the manner in which the Substantial Evidence Rule is applied in Pennsylvania Appellate proceedings will suffice to justify our objection to the attempt to include discussion of the *Landi* decision in Petitioner's Statement of her case.

CONCLUSION.

For the foregoing reasons, Respondents suggest that the reasons for a grant of the writ proposed by petitioner Barndt are inadequate, and that the Writ of Certiorari to Review the Judgment and Order of Court of Appeals for the Third Circuit should not be granted.

Respectfully submitted,

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Dated: June 12, 1980.

SUPPLEMENT TO RESPONDENTS' BRIEF IN OPPOSITION.

As mentioned earlier, the sole function of this Supplement will be to correct that part of the Petitioner's Statement of the Case which described Respondents as:

> . . . all the members of the Board of School Directors at the time of petitioner's dismissal.

Our purpose is merely to avert any hint of waiver or admission as to the rights of a number of persons who never had any connection with the Barndt dismissal. Insofar as possible, the individuals to be named hereafter will be listed, last names only, in the order in which they appear on the first page of Petitioner's brief.

> Sabia. Mr. William Sabia is a former member of school board who disqualified himself and took no part whatsoever in the Barndt proceedings.
>
> Allen and Bauer. Elizabeth Allen and George T. Bauer are not represented here, never having been subjected to jurisdiction of the United States Court below.
>
> Thompson, Correnty, Gorg, Richwagon, Thornton, and Catz. These are the names of past or present members of the Wissahickon School Board, none of whom were on that Board at any time during the Barndt dismissal hearings.

Motions setting forth the foregoing facts as to the status of individual defendants were filed below and noted at the very end of the Opinion of Lord, Ch. J. as follows:

> The various other motions filed by individual defendants will be denied as moot in light of my granting of the umbrella motion (App. 25a).